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52nd Annual Refresher: Family Law

Lake Louise, Alberta

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To Disclose or Not Disclose: That is the Question

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TO DISCLOSE OR NOT DISCLOSE: THAT IS THE QUESTION

To disclose or not disclose: that is the question;
whether 'tis nobler in the mind to suffer
the slings and arrows of Madam Justice Yungwirth,
or to take arms against your client and their accountant,
by opposing them to suffer
the complaints and eye-rolling and their assurances
that you couldn't possibly require
every single schedule and attachment to the client's tax return….

Disclosure is mandatory. Disclosure is relatively easy. Yet, we routinely see it screwed up and it is often a barrier to getting a matter resolved. As a result of many issues arising from disclosure matters and an over-abundance of disclosure applications proceeding in morning chambers, the Courts in Alberta have finally taken charge and laid down some fairly stringent rules. These same Courts note however, that even though the rules are going to be fairly rigorously imposed upon the possessor of the information and disclosure, there are reasonable limits that must be kept in mind when assessing what disclosure your client really needs. If I can stress one thing in this paper, it would be the word "proportionality".

THE HIGH-WATER MARK

The Alberta Court of Appeal recently set out the most exacting disclosure requirements in the case of *Cunningham v Seveny*, 2017 ABCA 4 ("*Cunningham")*. The *Cunningham* case was the result of a number of cases that culminated in the Alberta Court of Appeal setting the bar for our current disclosure requirements. I will conduct a brief review of those cases below.

The first case was *Goett v Goett*, 2013 ABCA 216 ("*Goett"*). This decision from the Alberta Court of Appeal was the precursor to the *Roseberry v Roseberry*, 2015 ABQB 75 ("*Roseberry*") (reversed on appeal on other grounds), *Sweezey v Sweezey,* 2016 ABQB 131 ("*Sweezey*") and *Cunningham* cases. It examined the interplay between sections 18 and 19 of the *Federal Child Support Guidelines*, SOR/97-175 (the "*FCSG"*) where the payor was not a shareholder, director or officer but was the controlling mind and the *de facto* owner of the corporation. The ex-husband placed his new corporation in the name of his new wife. This new corporation operated the exact same business as the husband's previous corporation and the Court of Appeal had no problem in finding that the corporate pre-tax income could be considered in determining the appropriate amount of child support. They further stated that while section 18 did not specifically address this type of situation, the case law allowed them to pierce the corporate veil in such circumstances and section 19 allowed them to impute income in circumstances where it was their view that the tax return did not truly represent the income available for paying child support.

Following that was *Roseberry*. This was the first in a series of Judgments by Madam Justice D.A. Yungwirth that began the process of setting the disclosure bar quite high for the owner of a private corporation in child support matters. The principles that began to emerge in *Roseberry* were later expanded upon in the *Sweezey* and *Cunningham* cases. Justice Yungwirth found that proper disclosure included an explanation of the corporate expenses to isolate what were truly corporate expenses and what personal benefits were being received by the controlling shareholder spouse. She then further declined to follow a previous case of *McCaffery v Dalla Longa*, 2008 AB QB 183, in which it was determined that the applicant for child support had to make out a *prima facie* case that the deductions were unreasonable and at that point the onus would switch to the respondent to rebut this presumption. She expressly disagreed with that approach, which was later further supported by *Sweezey* and ultimately by the Court of Appeal in *Cunningham*. She also began to expound the idea that it should not fall on the recipient of child support to embark upon expensive discovery processes, hiring of experts or other costly procedures to obtain information that is in the possession or control of the shareholder spouse.

The next significant case was *Sweezey*. This is the second decision by Madam Justice D.A. Yungwirth dealing with financial disclosure in a child support application seeking ongoing and retroactive child support. In this case Mr. Sweezey was a truck driver who operated a company that he jointly owned with his new partner, Patricia McCurry. Ms. McCurry owned 80% of the corporation and Mr. Sweezey owned 20%, which was ultimately changed to 60% for Ms. McCurry and 40% to Mr. Sweezey. A further complicating feature was that Ms. McCurry actually did some work for the company and drove one of the trucks from time to time but Mr. Sweezey was clearly the main revenue generator for the company. There were also some personal expenses that were put through the company such as the loan and insurance on the 2009 Ford Truck, which was used primarily for personal purposes and the home telephone as examples. The Court cited the *Goett* decision in discussing piercing the corporate veil and concluded that the onus was on the shareholder spouse of showing that salaries, wages, management fees or other payments and benefits paid to a non-arm's length party were reasonable in the circumstances, otherwise they must be added to the pre-tax income of the corporation as set out in section 18(2) of the *FCSG*. She goes on to reiterate many of the comments that she made in *Roseberry* and which were later expanded upon in *Cunningham.* She noted that it is the obligation of the litigants to complete calculations that support their respective positions and this should not be left to the Court. She cautioned however, that expert evidence is not necessarily required to determine if a particular corporate expenditure is reasonable and that, absent expert evidence as to the personal benefit received by a non-arm's length party, the Court could look at the supporting documentation and make an estimate as to the appropriate deduction by using common